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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 781

INDUSTRIAL TRUST COMPANY ET AL., EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 44–46) entered December 28, 1943, is unreported. The opinion of the United States Circuit Court of Appeals for the First Circuit, filed October 29, 1945 (R. 59–64), is reported in 151 F. 2d 592.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1945. (R. 64–65.) The petition for certiorari was filed January 28, 1946. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether charitable bequests in remainder were deductible for estate tax purposes where trustees were given broad powers to divert the corpus to the decedent's wife, mother, and sister for any expenses when deemed by the trustees to be proper for their "comfort or pleasure."

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

The facts were stipulated (R. 26–30), and so far as material here may be summarized as follows:

J. Jerome Hahn, a resident of Providence, Rhode Island, died testate December 6, 1938, leaving a net estate for basic tax adjusted by the Commissioner of $1,658,460.45 (R. 10), the Commissioner having disallowed a deduction of $1,326,274.57, claimed as charitable bequests. The decedent left him surviving his widow, who is still living, then aged 65; his mother, since deceased, then aged 90, and his sister, now deceased, then aged 60 (R. 26–27).

By his will, the decedent devised and bequeathed to his wife, a residence and certain personal prop-

erty, and to sundry other individual beneficiaries a total of $26,500 in cash (R. 13–14).

By the thirteenth paragraph of his will the decedent transferred in trust all of the rest and residue of his estate, providing for the payment out of the income thereof of $12,000 annually to his wife, $6,000 annually to his mother, and a like amount to his sister (R. 14). Subdivision (3) of the paragraph then provided as follows (R. 15–16):

> (3) I authorize and direct my Trustees, if at any time, during the lifetime of my wife, in their sole and uncontrolled opinion and discretion, to be exercised by the Trustees other than my wife, the fixed income payable to my wife under this my will, shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure, to pay over to her, in addition to said fixed income for her personal use and benefit such and so much, from time to time, of the net income of my trust estate, or if that should be insufficient then such and so much of the principal of my trust estate, as said Trustees may deem to be required for any purpose approved by them, and all such income or principal paid over to my wife under the powers of this paragraph shall be freed and discharged of

> all trusts. I direct that said powers and discretions shall be liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support. I also give a like power and discretion to my Trustee to make additional payments out of income or principal, or both, to my mother and sister, and for like purposes, and with like effect.

Paragraph thirteenth also provided that, upon the death of the decedent's wife, a total of $21,000 should be paid to nine charitable organizations therein named (R. 16) and that, upon the death of his wife, and all other annuitants, or upon annuities being provided for all annuitants surviving her, $150,000 should be paid to Miriam Hospital, seven-eighths of the remainder to the Rhode Island Hospital, and the remaining one-eighth to certain named individuals (R. 17). The charitable nature of these bequests, except that of the one-eighth remainder, is conceded.

The petitioners valued the nine gifts, aggregating $21,000 as aforesaid, for purposes of the deduction claimed, "subject to the life estate" of the decedent's widow; the gift to Miriam Hospital at $79,125.50, and that to the Rhode Island Hospital at $1,233,024.55. The record does not, however, disclose the petitioners' method of valuing the two last mentioned gifts (R. 29–30).

In the years 1939 to 1942, inclusive, the trustees paid the following amounts to the widow under

the terms of the trust; in 1939, $21,594.91; in 1940, $21,836.81; in 1941, $24,054.38, and in 1942, $26,116.72. The trustees also paid $6,000 to the decedent's mother and a like amount to his sister in each of these years, except in 1942, when they paid nothing to the mother, who had died in November 1941 (R. 27); in addition, the trustees accumulated the following amounts of income (R. 31): In 1939, none; in 1940, $52,490.65; in 1941, $71,347.95; in 1942, $71,620.27. In addition thereto the executors of the decedent's will accumulated the following amounts of income: In 1939, $28,842.88; in 1940, $21,345.09; in 1941, $29,188.55; in 1942, $55,828.51 (R. 32).

The Commissioner disallowed the deduction on account of bequests to charity as not coming within the provisions of the Internal Revenue Code (Section 303 (a) of the Revenue Act of 1926, 44 Stat. 72, as amended; 26 U. S. C. 812 (d), *infra,* p. 9) and applicable regulations (R. 11). The Tax Court sustained the Commissioner's determination on the ground that the decision of this Court in the case of *Merchants Bank* v. *Commissioner,* 320 U. S. 256, was determinative here (R. 44–46). The court below affirmed the Tax Court's decision (R. 65).

ARGUMENT

The court below correctly held that this case is controlled by *Merchants Bank* v. *Commissioner,* in which the trustee had been authorized to in-

vade the corpus for the "comfort, support, maintenance, and/or happiness" of the testator's widow. This Court approved the applicable Treasury regulations which provided that to the extent that there is a power in a private donee or trustee to divert the property from charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." 320 U. S. at 260.

Substantially identical regulations are applicable here (Article 47, Regulations 80 (1937 edition), Appendix, *infra*, p. 11). In this case, the trustees in their "uncontrolled * * * discretion" were authorized to pay to the testator's wife so much of the principal as they may deem to be required for any purpose approved by them where the income "shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure * * *." (R. 15.)[1] And the trustees were given like powers to make payments of principal to the testator's mother and sister. (R. 15–16.) In the circumstances, it is clear that

[1] The will also directed that the powers and discretions should be "liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support". (R. 15.)

the *Merchants Bank* decision is dispositive of this case.

However, after the decision in the *Merchants Bank* case, both the Fourth and Ninth Circuit Courts of Appeals failed to give effect to the Treasury regulations. *Commissioner* v. *Robertson's Estate,* 141 F. 2d 855 (C. C. A. 4); *Commissioner* v. *Wells Fargo B. & U. Tr. Co.,* 145 F. 2d 130 (C. C. A. 9). In each of these cases the court proceeded upon the premise that the issue turned not upon the *character* of the power of invasion, but upon the *likelihood* of its exercise.[2] That approach was squarely in conflict with the *Merchants Bank* decision, and those decisions are therefore in conflict to that extent with the decision herein. Nevertheless, in view of the fact that the *Merchants Bank* decision so clearly controls this case, we oppose the granting of the petition.

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[2] While it is true that the Tax Court has, in cases decided since the *Merchants Bank* case, recognized the power of invasion test and undertaken to apply it (see e. g., *Estate of Wetherill* v. *Commissioner*, 4 T. C. 678, petition dismissed, 150 F. 2d 1019 (C. C. A. 9th); *Estate of Cutler, Jr.* v. *Commissioner*, 5 T. C. No. 159 (a decision reviewed by the full Tax Court); *Estate of Holmes* v. *Commissioner*, 5 T. C. No. 156, and *Estate of deCastro* v. *Commissioner*, decided June 19, 1945 (1945 P-H T. C. Memorandum Decisions Service, par. 45,209)), nevertheless, in doing so, it has neither overruled nor disapproved its former decisions based on the probability of invasion test.

Respectfully submitted.

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